No. 14800

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANCES P. SYRACUSE and NEW WONDER BAG CORP.,

Appellants,

vs.

HARRY PARIS,

Appellee.

APPELLEE'S BRIEF RE PETITION FOR REHEARING.

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Background.

To understand why Appellants' counsel writes briefs as he does, a little background of the man is necessary in order to understand him. After the Motion for Summary Judgment had been granted in this case, and before the appeal had been perfected, a conference was held by Alan Franklin, counsel for Appellants, Henry N. Cowan, of counsel for Appellee, the Appellee himself, and the undersigned.

At that conference, it was pointed out to Alan Franklin the extreme closeness of the Shanzer patent, and it was shown to him that he should not put both parties to the expense of an appeal in a case that was so hopeless. His reply was amazing. Franklin at that time (April 11,

1955) in the office of the undersigned, with the foregoing parties present, stated,

> "Well, I am trying to reform the Patent System. I want to show the Federal Courts and especially our Court of Appeals that it is not capable of handling patent cases and should not hear them!"

Bitter Attacks.

In the first of his four (so far) Petitions and Supplemental Petitions, to wit, on page 28 of his printed Petition for Rehearing, Franklin for the first time admits of record in this case that he is crusading for "Reform of the American patent system".

In his attempt to reform everybody (but himself), he attacks the undersigned, the lower court, this Honorable Court, unnamed alleged infringers, and Appellants' former counsel. The judgment of the lower court was called "crude and most irregular" [(1), p. 4]. The Summary Judgment by the lower court was called a "wild summary judgment", Certain findings and conclusions of the lower court were termed an "absurdity" and "irresponsible" [(1), pp. 20-1]; he claimed some other matter was "carelessly overlooked" [(2), p. 7]. None of which is correct.

This Honorable Court came in for more than its share of venom. This Court is charged with refusing to hear Crusader Franklin, "because he did not have in his possession the actual patent in suit" [(1), p. 10]. This, of course, is 100% in error. The hearing in this Court was castigated as a "supposed" hearing [(1), p. 12], and on the

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(1) Printed Petition for Rehearing. Hereinafter referred to as (1).

(2) First Supplemental Petition for Rehearing, dated July 14, 1956. Hereinafter referred to as (2).

same page this Court was accused of being "arbitrary" [(1), twice, pp. 12 and 13]. If the undersigned may be permitted a word on behalf of this Honorable Court, I would say that this Court was extremely patient with Alan Franklin at the hearing, in view of his woeful lack of understanding of this case.

Further charges against this Court by Reformer Franklin are that this Honorable Court "misspent its time" [(1), p. 27] in this case. He claimed that, "A court of justice" [(1), p. 27] would recognize the real merits in this case, inferring that this is not such a court. He then positively asserted that his clients have been "unlawfully" [(1), p. 27] denied their rights.

This Honorable Court is also accused that it could not or "would not consider a hearing" in this case "on anything but the original patent" [(1), p. 16]. Of course, this Court did not say any such thing! Counsel also complains that this Court threw him "out of the Temple of Justice" because "he did not come into said temple through the front door" [(1), p. 28].

This Court was placed in the same deplorable category as the lower court, to wit, of being accused of having "carelessly overlooked" some element [(2), p. 7].

The final shot at this Court (so far—for undoubtedly there will be continued Supplements and Supplements to Supplements, until this Court decides his Petition for Rehearing), was as to this Court's alleged "misunderstanding of the patent law" [(3), p. 3]. There was also the none too veiled threat to this Court that Crusader Franklin "hopes that he will not be required to secure a ruling

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(3) Letter to Paul P. O'Brien, Esq., Clerk of the Court, dated July 19, 1956. Hereinafter referred to as (3).

from the Supreme Court" as to the admissibility of copies of patents [(1), p. 16]. The fact that this Court has never made such a ruling seems not to perturb the Reformer in the slightest. He primarily wants to reform the American Patent System.

Further Attacks.

In order to pass around his poison, Reformer Franklin calls alleged infringers (other than Defendant-Appellee) "unscrupulous infringers, who should be behind the bars", and he levels off at one unnamed "dishonorable infringer" [(1), p. 22].

Even Appellant's former counsel, Robert E. Geauque, comes in for his share of attack. He is accused of "incompetence" and "collusion" with the undersigned. In line with his throwing around of insinuations, Franklin threatens further action before the State Bar [(3), p. 4]. If his claimed future action is as baseless and ill-fated as the first attempt which he helped his client make, the State Bar will have little to do with his claims. His client admitted under oath that her first complaint to the State Bar against her former counsel, Robert E. Geauque, was false.

Since the undersigned seems to Reformer Franklin to be standing in his way, his heaviest guns are leveled at the undersigned. I am reminded of an old couplet:

"What all experience tends to show:
No mud can hurt you but the mud you throw."

The attacks on the undersigned are not only wholly irrelevant to this case, but are believed to be entirely unfounded. Not that the Martindale-Hubbell directory is the final arbiter in such matters, but it is noticed that Alan Franklin has been admitted to practice law almost fifty years, but they do not give him any rating. The undersigned has the highest rating, and is and has been for some time a member of Committees of the two national organizations of patent lawyers: the Patent Section of the American Bar Association and the American Patent Law Association. It is believed that the undersigned has built up a reputation for conscientious work for clients: the continued growth of his practice would so indicate.

It should be added that the undersigned was not forced to resign from the Los Angeles Patent Law Association. He did resign from it about eighteen years ago, although he was asked at the time not to do so, and has been asked several times since then to re-join. He did not engage in unethical advertising eighteen years ago, as claimed, nor at any other time. He is not sure whether he "insulted" the officers of that Association eighteen years ago, but is of the opinion that he did not. It is not clear what constitutes an "insult" of an officer of such an Association.

The credibility of Crusader Franklin's attacks can be judged by his continued claim (despite clear facts to the contrary) that the undersigned "stole" the Appellants' original patent. The fact that it is and has been in the office of the Clerk of this Court does not seem to faze Alan Franklin.

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Issues.

It is fully realized by the undersigned that the foregoing is not determinative of any issues in this case, but petition is made for this Honorable Court's indulgence in permitting the undersigned to answer the personal slurs, innuendoes and absolute misstatements of fact made against him by appellant's counsel. They just could not go unchallenged.

After taking out all the attacks from Alan Franklins' several briefs, there is not much left. He still has learned nothing in this case. He still does not know why Circuit Judge Fee said at the hearing that he wondered why Alan Franklin had not filed an affidavit in the lower court that had something to do with this case, instead of the affidavit about the irrelevant briefcase, "Exhibit X".

Alan Franklin still does not know that the prior patent to Shanzer constitutes an anticipation of the patent in suit whether it is valid or invalid. Shanzer was the prior inventor as shown by the Patent Office records, valid or invalid.

Alan Franklin still does not know that a design patent can and does anticipate a mechanical patent. He is too busy reforming to worry about these things.

Franklin's argument about an attorney testifying has no pertinence here. The affidavit of the undersigned concerned purely formal matters: identification of the patents cited by the Examiner during prosecution of the patent in suit, and listing a few prior patents not cited by the Examiner. These formal matters were undisputed; even Alan Franklin has never denied any of the statements in this affidavit.

Notice Given.

Franklin, without legal basis, argues that the Shanzer patent should not have been considered by this Honorable Court because it was not pleaded. Apparently he is not aware that 35 U. S. C. §282 provides that it may be in the pleadings "or otherwise in writing . . . 30 days before the trial."

Appellants' counsel acknowledged a copy of such affidavit on September 3, 1954, and so had notice of it in writing 30 days before trial.

Alan Franklin makes the misleading claim that the Shanzer patent is not an anticipation because it was not patented more than one year prior to the application for the patent in suit! This is not the law and never has been. He cites no authority in support of that statement —nor can he. *Any* prior patent which shows that someone else was an earlier inventor is a proper, lawful, anticipation. In *Milburn Co. v. Davis-Bournonville Co.*, 270 U. S. 30, 70 L. Ed. 651, the Supreme Court held that even a co-pending application is an anticipation if it were filed first. In the present case, the Shanzer patent was issued before Mrs. Syracuse applied for her patent in suit. Therefore, it is an anticipation.

The efforts to attack the Shanzer patent from different directions are an implied admission by Alan Franklin that it is a key reference, which it is. The very close pertinence of the Shanzer patent was gone into in Appellee's original Brief herein, and reference is made to same as though fully repeated at this point. This Honorable Court was fully entitled to say that the Shanzer patent, not cited by the Patent Office, requires invalidation of the patent in suit.

Nothing New.

Nothing new appears in any of Alan Franklin's four (so far) Petitions and Supplemental Petitions, over what he presented previously. He admits the several authorities cited down to the middle of page 6 (1) were all cited before. No new rule of law was pointed out in any of his papers; no new fact has been brought out. They all merely re-hash what he said before.

There was no genuine issue as to any material fact in the court below. Issuance of the Shanzer patent on the date it bears was and is undisputed, and its subject matter is undisputable. There would be nothing to try in this case. Commercial success, of course, can play no part where the patent in suit is clearly anticipated by the Shanzer patent. Commercial success is used only in case of doubt. *Tipper Tie, Inc., et al. v. Hercules Fasteners, Inc.,* 105 U. S. P. Q. 182 (D. C. N. J. 1955).

Assess Damages Against Appellants.

It is respectfully requested that this Honorable Court assess damages against appellants for their frivolous, delaying Petition for Rehearing. The sum of $1500.00 was assessed in the case of *Wagner Electric Mfg. Co. v. Lyndon,* 262 U. S. 226, 67 L. Ed. 961, 964-5, for a delaying proceeding that was frivolous and without merit. It was based on a Supreme Court Rule that was similar to Rule 24 (2) of this Honorable Court. Said amount was assessed even though "the decree appealed from was not a money judgment", and even though it did not come "within the exact terms" of the rule.

Conclusion

It is respectfully submitted that no grounds have been stated in any of the Appellants' several papers, printed or unprinted, why a rehearing should be granted in this case. The record was carefully considered by this Honorable Court; the patent in suit is clearly anticipated by the Shanzer patent, which is not a "fake" patent [(2), p. 8]. Alan Franklin could not resist attacking viciously even an inanimate object in his announced path to "reform".

It is respectfully submitted that the Petition for Rehearing should be denied, and that damages should be assessed against appellants for their frivolous, delaying Petition for Rehearing.

Respectfully submitted,

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Warner, Peracca & Cowan,

Henry N. Cowan,

Of Counsel.